

FILED BY CLERK

SEP 27 2007

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

JAMES ANTHONY STAPLES,

Appellant.

2 CA-CR 2006-0204
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053759

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and David A. Sullivan

Tucson
Attorneys for Appellee

Higgins and Higgins, P.C.
By Harold L. Higgins, Jr.

Tucson
Attorneys for Appellant

P E L A N D E R, Chief Judge.

¶1 A jury found James Anthony Staples guilty of two counts of aggravated assault, two counts of kidnapping, and one count each of attempted armed robbery, attempted aggravated robbery, and first-degree burglary. The trial court sentenced him to concurrent and consecutive prison terms totaling fifty-six years. On appeal, Staples challenges the trial court's denial of his motion for a continuance made on the first day of trial and his motion for a new trial based on newly discovered evidence. We affirm.

Background

¶2 “We view the evidence in the light most favorable to upholding the convictions.” *State v. Marshall*, 193 Ariz. 547, ¶3, 975 P.2d 137, 138 (App. 1998). Three men armed with handguns entered the home of Robert J. while he, his two children, and Arturo N. were present. The men forced Arturo and the two children into the bedroom and demanded money from Robert. During an ensuing physical altercation, one of the intruders shot Robert twice in the leg before he, Arturo, and the children managed to safely leave the residence.

¶3 Police arrived during the incident and observed three men emerge from the house. Officers found Staples and his brother, Thomas Henry, hiding in backyards in the neighborhood and took them into custody. That night, Arturo identified Staples and Henry as two of their assailants. At trial, both Robert and Arturo identified Henry and Staples, who were tried together.

¶4 On the first day of trial, Staples moved for a continuance based on the recent discovery of more than 100 taped telephone calls supposedly between Robert or Arturo and a jail inmate, Sam Rakeshaw. Although Staples’s counsel had not yet listened to the tapes, he thought they would contain admissions by the victims about their inability to identify Staples. The defense intended to use this evidence to impeach Robert’s testimony and exculpate Staples.¹

¶5 The trial court denied the motion but preserved Staples’s opportunity to present any evidence discovered after listening to the tapes. The court asked the defense investigator to listen during the trial to the tapes, which totaled approximately twenty hours, so that any newly discovered evidence could be introduced. At the end of the second day of trial, Staples’s counsel informed the court that he intended to listen to the remaining tapes that night before resting his case. The defense rested the next day without mentioning any additional evidence. On the fourth day of trial, the jury returned its verdicts finding Staples guilty of all charges.

¶6 Staples thereafter moved for a new trial, arguing that one of the tape-recorded telephone conversations indicated that Rakeshaw might have “tamper[ed]” with Robert’s testimony. Staples acknowledged he had been “unable to find any phone calls that actually contained a conversation between Rakeshaw and the victims.” But Staples submitted a

¹Robert testified that his girlfriend’s cousin was married to Henry and that he had “seen [Staples and Henry] from being around the family.”

transcript of a phone call from Rakeshaw to his girlfriend in which Rakeshaw had instructed her to “[j]ust call [an unidentified female] and say[,] girl[,] Sammy said tell Bobby to go through with it.”² Later in the conversation, Rakeshaw said, “you tell her exactly what I said[,] man[,] go ahead and go through with this . . . , throw them in the toilet.” During the same call, Rakeshaw said he had spoken by phone the day before with Catherine, supposedly Henry’s wife.³

¶7 Before the motion hearing, the defense interviewed both Rakeshaw and his girlfriend; although the investigator thought they both had lied, Staples failed to obtain additional facts from them. The trial court found that evidence of the phone call, even if admissible, did not establish that Rakeshaw had “caus[ed] some kind of false testimony to be elicited that caused [Staples] to be convicted.” Accordingly, the court denied the motion. This appeal followed.

Discussion

Motion for Continuance

¶8 Staples argues the trial court erred in denying his motion for continuance because the taped conversations would have been valuable at trial by weakening the testimony of the state’s main witness, victim Robert J. Because Robert did not immediately

²During trial, both the prosecutor and Arturo sometimes referred to Robert as “Bobby.”

³A witness at trial identified Henry’s wife as Catherine.

cooperate with the police and because his testimony contained various discrepancies, Staples argues, the jury would have heavily weighed Rakeshaw's influence when considering Robert's testimony. The denial of a motion for continuance "will not be disturbed unless there is a clear abuse of discretion and prejudice results." *State v. Williams*, 144 Ariz. 433, 441, 698 P.2d 678, 686 (1985). We find neither an abuse of discretion nor prejudice here.

¶9 Staples acknowledges that the information he provided to support his motion for a continuance "was necessarily sketchy, since he had only hearsay information regarding the call." We cannot find the trial court abused its discretion in denying that motion when, at best, it rested on sheer speculation and vague assertions that new evidence, if discovered in the taped telephone calls and if relevant and ruled admissible, might be used to impeach Robert. *See State v. Loyd*, 118 Ariz. 106, 110, 574 P.2d 1325, 1329 (App. 1978) (no abuse of discretion to deny continuance when testimony sought would be used solely for impeachment purposes); *cf. State v. Cornell*, 179 Ariz. 314, 328, 878 P.2d 1352, 1366 (1994) (rejecting argument of prosecutorial misconduct based on "sheer speculation").

¶10 In addition, Staples took full advantage at trial of his multiple opportunities to impeach Robert, pointing out inconsistencies and casting doubt on his testimony. Even had the additional evidence been fully known and ruled admissible by the trial court, Staples has not established prejudice from his inability to present it. At most, the new evidence would have shown that an inmate had told his girlfriend to tell an unidentified third person to tell Robert "to go through with it." As the trial court later noted in ruling on Staples's

motion for a new trial, no evidence showed that Robert had been asked or influenced to testify “falsely or improperly or—in a coerced manner.” And, when it ruled on the requested continuance, the trial court had no reason to believe any new evidence would be uncovered and presented that would undermine Robert’s expected testimony.

¶11 Moreover, even assuming Rakeshaw’s mention of “Bobby” in the phone call referred to Robert, Rakeshaw did not mention Arturo, who was the other crucial witness and victim; nor did the additional evidence discredit his testimony in any way. Arturo identified Staples on the night of the crime and at trial, and his ability to identify Staples was not called into question by the additional evidence.

¶12 Finally, the trial court provided Staples the opportunity to listen to the tapes and recall any witness or call additional witnesses if the tapes yielded something significant before the trial ended. Defense counsel said he was ready for trial and did not seek the continuance based on a need for more time to investigate or prepare.⁴ Because the evidence, at best, would have only served to impeach Robert, and because the defense had listened to all of the tapes before resting its case, the trial court did not abuse its discretion in denying the requested continuance.

⁴The attorney who represented Staples at trial was the fourth attorney appointed in six months and received the case three weeks before trial. To the extent Staples suggests that fact supported his motion to continue, the argument is waived absent fundamental error, which Staples does not allege, and we do not find. *See State v. Barraza*, 209 Ariz. 441, ¶ 19, 104 P.3d 172, 178 (App. 2005). Counsel did not argue that below and, in fact, said he was prepared for trial.

Motion for New Trial

¶13 Staples next asserts the trial court erred in denying his motion for new trial in light of the newly discovered evidence. A motion for new trial based on that ground is disfavored, and a trial court's denial of such a motion will not be disturbed absent an abuse of discretion. *State v. Soto-Fong*, 187 Ariz. 186, 195-96, 928 P.2d 610, 619-20 (1996).

The requirements for granting a new trial include:

“(1) the motion must show that the evidence relied on is, in fact, newly discovered; (2) the motion must allege facts from which the court can infer due diligence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) the evidence must be material to the issue involved; and (5) it must be evidence which, if introduced, would probably change the verdict if a new trial were ordered.”

Id. at 196, 928 P.2d at 620, *quoting State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991). The trial court did not abuse its discretion in implicitly finding several of those factors lacking.

¶14 First, Staples asserts that, even though he knew the evidence existed on the first day of trial, the evidence is newly discovered because he did not have the details of the calls until after the trial. This argument fails because “[e]vidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence.” *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). Here, the court, defense counsel, and the prosecutor became aware of the tapes when Staples

moved for a continuance. The defense listened to all of the tapes before resting and cannot claim Staples first learned of the phone call only after trial. And, even after the court allowed the defense more time to investigate and after the defense investigator had interviewed both Rakeshaw and his girlfriend, Staples still failed to uncover any meaningful new evidence. Therefore, the transcript of the phone call does not constitute newly discovered evidence.

¶15 Even if it did, however, Staples failed to satisfy the other requirements for a new trial. At most, evidence of the phone call between Rakeshaw and his girlfriend, if deemed relevant and ruled admissible, would have merely been used for impeachment. Moreover, Staples acknowledged in his motion that the phone call was “not direct evidence that could be used to impeach the victim” but merely pointed up a need for further investigation. In addition, the trial court reasonably could have concluded that any evidence of the phone call was not likely to have changed the trial’s outcome.

¶16 Still, Staples maintains the new evidence “goes directly to the heart of the victim’s testimony” and raises questions about whether Robert and Rakeshaw had been involved in drug dealing. This argument fails because Staples raised these doubts and credibility issues at trial, cross-examining Robert about the large amount of cash in his pocket and a white powder residue found in his house after the crime. In closing argument, defense counsel again brought up the possibility that Robert was a drug dealer. As

discussed above, counsel also impeached him with various other discrepancies in his testimony.

¶17 Finally, this argument, like Staples’s first argument, rests on sheer speculation. It is not clear that the single telephone call Staples cited in support of his motion for new trial even referred or related to Robert, let alone established that Rakeshaw was somehow attempting to improperly influence Robert’s testimony in this case. Nor does Staples point to anything in the record to support his contention that Robert had ever expressed “intense dislike” of him. In sum, the trial court did not abuse its discretion in denying the motion for a new trial.

Disposition

¶18 The convictions and sentences are affirmed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge